Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:2:TL-N-1734-01
JSRubinstein

date:

to: Richard Fleming, Territory Manager, Communications
Attention: Marty Peltz, Revenue Agent, LMSB

from: Area Counsel (Financial Services)

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subject: [redacted]
Tax Years Ended: [redacted], [redacted], [redacted] [redacted] & [redacted].
Form 872 - Consent to Extend the Statute of Limitations
Statute of Limitations Expires: [redacted]

Uniform Issue List # 6501.08-00; 6501.08-17; 1502.75-00

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance. This memorandum should not be cited as precedent.

Issue

What specific language should be used in the caption of a Form 872, Consent to Extend the Statute of Limitations on Assessment, for [redacted]?

Facts

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the

review as soon as we hear from that office, which should be in approximately 10 days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

[redacted]

On [redacted], pursuant to an Amended and Restated Agreement and Plan of Merger, dated as of [redacted], as amended and restated as of [redacted] and as of [redacted], ("the agreement"), [redacted] ("[redacted]"), EIN [redacted], a Pennsylvania corporation, merged with and into [redacted]. Under the terms of the agreement, each share of [redacted] Common Stock was converted into the right to receive [redacted] shares of [redacted] Class B Common Stock and each share of [redacted] Series B Preferred Stock was converted into the right to receive [redacted] shares of [redacted] Series C Preferred Stock. (Article II, Section 2.01(a)(i) of the agreement) The merger qualified as a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3). Pursuant to Treas. Reg. § 1.1502-75(d)(3), [redacted] and it's subsidiaries merged with and into [redacted], and the shareholders of [redacted] immediately before the merger, as a result of owning stock of [redacted], owned more than [redacted]% of the fair market value of [redacted] stock immediately after the merger. The group of which [redacted] was the common parent ceased to exist as of the date of acquisition. The group of which [redacted] was the common parent was treated as continuing in existence with [redacted] being added as a member of the group and [redacted] taking the place of [redacted] as the common parent of the combined consolidated group.

The Articles of Merger - Domestic Business Corporation, filed with the Department of State of Pennsylvania and the agreement, state that the corporation surviving the merger is [redacted]. (Articles of Merger - Domestic Business Corporation, line 1 and Article I, Section 1.01(c) of the agreement.) The Form 10-K, filed with the Securities and Exchange Commission for the year ended [redacted], states that the I.R.S. employee identification number of the surviving corporation is [redacted], which is the same as [redacted]'s EIN prior to the merger.

[redacted] filed its U.S. Corporation Income Tax Returns, Form 1120, on a consolidated basis with its subsidiaries for the tax years ended [redacted], [redacted], [redacted], and [redacted]. You have requested advice regarding the appropriate language for a Form 872, Consent to Extend the Time to Assess Tax, in connection with the consolidated U.S. Income Tax Returns for [redacted].

Discussion

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual ("IRM"). Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the extension, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or its equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For income taxes, the form used by the Service to extend the limitations period on assessment is Form 872 (Consent to Extend the Time to Assess Tax).

The common parent of a consolidated group is the proper party to extend the statute of limitations for income tax for any tax year for which it was the common parent, so long as it remains in existence. The common parent remains in existence despite a "mere change in identity, form, or place of business." Treas. Reg. § 1.1502-75(d)(2).

In the instant case, the agreement, as well as the provisions of Treas. Reg. § 1.1502-75(d)(3)(i), provide that [redacted] survived the merger and became the common parent of the combined group. Since [redacted] has not been the subject of a merger or corporate name change, the caption for the Consent to Extend the Time to Assess Tax, Form 872, does not require special language and should simply read as follows:

"[redacted]
(E.I.N. [redacted])"

The Form 872, should be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of [redacted]. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Should you have any questions regarding this matter, please feel free to call me at (212) 264-1595, extension 265.

ROLAND BARRAL
Area Counsel
(Financial Services)

By:______________________________
JODY S. RUBINSTEIN
Attorney(Large and Mid-Size Business)